In the Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-563

FREDRICK LIOSI, *Petitioner*

79-563

VS.

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, FREDRICK LIOSI, respectfully prays that a Writ of Certiorari be issued to review the Opinion entered on September 6, 1979 by the United States Court of Appeals for the Sixth Circuit, affirming the judgment of conviction entered by the United States District Court for the Western District of Pennsylvania for the reasons expressed in the petition herein.

OPINION BELOW

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2509

UNITED STATES OF AMERICA

v.

ALEX SALVATORE CALARCO
ANDREW N. LoCONTI
EVERETT BONDS
FREDRICK LIOSI
JOHN ESPOSITO

FREDRICK LIOSI, *Appellant*

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Crim. No. 78-00101-04)

Argued
September 6, 1979
Before: **ALDISERT, ROSENN** and **GARTH,** *Circuit Judges.*

JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit, that (1) the trial court erred in overruling appellant's motions for a separate trial or to exclude statements of co-defendants thereby denying him his right to confront witnesses against him as guaranteed by the Sixth Amendment to the United States Constitution, and that the trial court further erred in admitting into evidence statements of the appellant surreptitiously obtained in violation of his right to counsel under the Sixth Amendment to the United States Constitution and his right against self-incrimination as guaranteed by the Fifth Amendment to the United States Constitution, (2) the trial court erred in overruling appellant Liosi's motion for a change of venue thereby denying him his right to trial in the district where the alleged crime took place in violation of the Sixth Amendment to the United States Constitution, (3) the trial court erred in improperly summarizing the arguments of counsel for the government and the defendants and thereby brought attention to the failure of the defendants to offer evidence in their own behalf, (4) the trial court erred in overruling appellant Liosi's requested instruction that the jury could convict him of theft as alleged in Count II or receiving as alleged in Count III but not both charges, and (5) the trial court erred in overruling the motion of the appellant, Fredrick Liosi, for a

judgment of acquittal as to Counts I, II, and III of the indictment, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

R. J. ALDISERT
Circuit Judge

Attest:

_____

Thomas F. Quinn, *Clerk*

DATED:

September 6, 1979

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on the day of September, 1979. Within thirty (30) days of that date, petition for Writ of Certiorari was filed, pursuant to Rule 22 (2) of the Revised Rules of the United States Supreme Court. The jurisdiction of this Honorable Court is invoked under Section 1254 (1) of Title 28 of the United States Code.

QUESTIONS PRESENTED

I.

In a federal prosecution for theft from interstate commerce did the court err in admitting into evidence statements of co-defendants obtained two years after termination of the conspiracy, as alleged, or in the alternative, did the court err in denying the petitioner's motion for a separate trial thereby denying him his right to confront witnesses against him as guaranteed by the Sixth Amendment of the United States Constitution?

II.

In a federal prosecution for thefts from interstate commerce did the trial court err in denying petitioner's motion for a change of venue where the only act within the district wherein prosecution was had was the making of a false police report to mislead investigative authorities, thereby denying petitioner his right to trial in the district where the crime occurred in violation of the Sixth Amendment to the United States Constitution.

III.

In a federal prosecution for theft from interstate commerce, did the trial court err in refusing petitioner's requested jury instruction that the jury could

convict him of theft or receiving stolen property but not both charges?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Question/Argument I:

UNITED STATES CONSTITUTION, AMENDMENT VI

"In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him."

Question/Argument II:

UNITED STATES CONSTITUTION, AMENDMENT VI

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . ."

18 U.S.C. 659

. . . The offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said money, baggage, goods, or chattels.

18 U.S.C. 3237a

(a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

FEDERAL RULES OF CRIMINAL PROCEDURE, RULE 21 (b)

(b) **Transfer in Other Cases.** For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to him or any one or more of the courts thereof to another district.

STATEMENT OF THE CASE

On October 9, 1975, Everett Bonds, an independent trucking contractor, entered into an agreement with the Sea-Cold Services Corporation of Glouchester, Massachusetts to drive a shipment from Cleveland, Ohio to New Orleans, Louisiana. Nola Forwarding of New Orleans, Louisiana was contacted and arrangements were made further for Everett Bonds to then deliver a shipment from New Orleans to various points in Massachusetts consisting of 611 cases of shrimp totalling 33,553 pounds. On October 20, 1975, one John Esposito, an employee of Everett Bonds, reported to the Pennsylvania State Police that the truck he was driving for Everett Bonds with the aforementioned load of shrimp, ultimately destined for Ipswich, Massachusetts, was hijacked in the State of Pennsylvania where he was tied up and left alongside the road.

Subsequently, Alex Salvatore Calarco of Cleveland, Ohio, contacted Raymond Vance Robbins of Cincinnati, Ohio on October 23, 1975 to assist in disposing of twelve thousand pounds of shrimp. Ray Robbins later received the shrimp in question after having met with Alex Calarco and Fredrick Liosi at Cleveland Hopkins International Airport in Cleveland, Ohio. Alex Calarco and Fredrick Liosi were supposed to have been representing Andrew LoConti with whom Ray Robbins had prior business dealings. Ray Robbins then contacted Robert Whiteneck of Cincinnati, Ohio, who, through his grandson, Michael Schwartz, assisted in selling the shrimp to the E.J. Kozin Company of Chicago, Illinois. Following this arrangements were made to deliver a second load of shrimp to the E.J.

Kozin Company in Chicago, by Ray Robbins through Robert Whiteneck of Cincinnati, Ohio.

The Federal Bureau of Investigation entered the case and interviewed John Esposito regarding this reported theft from interstate commerce. After an investigation of approximately two years, an indictment was obtained against Ray Robbins for theft of the shrimp from interstate commerce. Ray Robbins then placed telephone calls to various defendants on January 20, and March 14, 1978 at the request of the Federal Bureau of Investigation; these telephone calls were monitored and recorded. As a result of these telephone calls and investigation indictments were obtained against Alex Salvatore Calarco, Andrew M. LoConti, Everett Bonds, Fredrick Liosi, and John Esposito, in Case Number 78-101, alleging violations of Title 18 USC 371 and 659, Conspiracy, Theft, and Receiving Goods Stolen from Interstate Commerce. (see App. 197-201).

Trial was begun on September 20, 1978 in the United States District Court for the Western District of Pennsylvania before the Honorable Barron P. McCune. John Esposito and Ray Robbins testified on behalf of the government during the trial. Objections were timely made to introduction of the recorded telephone conversations, venue of trial of the case, the trial court's summaries of arguments of counsel, the refusal of the trial court to instruct the jury as requested by the defense and denial of the judgment of acquittal. Verdicts of guilty were returned as against all the defendants on all counts on September 29, 1978.

REASONS FOR GRANTING THE WRIT

I.

A VIOLATION OF THE SIXTH AMENDMENT RIGHT TO CONFRONTATION BY ADMISSION AGAINST THE PETITIONER OF STATEMENTS OF THE CO-DEFENDANTS AND DENIAL OF THE PETITIONER'S MOTION FOR A SEPARATE TRIAL.

During trial of the case of the *United States v. Alex Calarco, et. al.,* the trial court admitted into evidence six tape recorded conversations between the witness, Ray Vance Robbins and several of the co-defendants. (App. p. 94-145). The court further allowed the jury to view transcriptions of these telephone conversations as they were being played in the courtroom. Defendant, Liosi, had previously moved the trial court to order a separate trial of his case (App. p. 12), which motion was overruled (App. p. 3). Motions for the various defendants, including defendant Liosi, were renewed prior to the witness, Robbins', testimony about them (App. p. 55-58) and overruled (App. p. 59).

The offense at trial was alleged to have occurred in October of 1975. The telephone calls admitted into evidence took place on January 29, 1978, and March 15, 1978. A period of approximately two years and three to four months had elapsed between the theft and/or receiving offenses as alleged and these telephone conversations.

During these recorded telephone conversations defendant, Liosi was incriminated by the co-defendants. On January 20, 1978, in two separate telephone conversations with the witness, Ray Robbins, defendant Everett Bonds implicated defendant Liosi as having received money along with defendant Alex Salvatore Calarco as a result of this alleged theft in interstate commerce. (App. p. 100-102; 109-110). Likewise, defendant Andrew LoConti implicated defendant Liosi as having received proceeds of the transaction. (App. p. 114-120). The recorded conversations of March 15, 1978 with defendant Calarco corroborated that defendant Liosi received certain monies as a result of his participation in the transaction as alleged. (App. p. 130-131, 133, 136-138).

When two or more persons have conspired to commit an offense everything said or done by one of them during the conspiracy, if said or done in furtherance of that conspiracy, is admissible into evidence against the other conspirators. This is a recognized exception to the hearsay rule. *Clune v. United*

States, 159 U.S. 590 (1895); *Fiswick v. United States,* 320 U.S. 211 (1946); *Dutton v. Evans,* 400 U.S. 74 (1970); *United States v. Morello,* 250 F. 2d 631 (2nd Cir. 1957); *United States v. Payden,* 536 F. 2d 541 (2nd Cir. 1976). The reason for the conspiratorial exception to the hearsay rule ends when there is no community of interest between the person whose act or statement is offered into evidence and the accused. *United States v. Morello, supra; United States v. Blackshire,* 538 F. 2d 569 (4th Cir. 1976).

Ordinarily, the courts permit considerable latitude in the proof of a conspiracy to commit a crime. *United States v. Ragland,* 375 F. 2d 471 (2nd Cir. 1967). Thus, the court may admit evidence tending to show a conspiracy such as conversations between conspirators, statements by conspirators, or declarations of an accused tending to show a conspiracy. *Osborne v. United States,* 371 F. 2d 913 (9th Cir. 1967).

One established limitation on the conspiratorial exception to the hearsay rule is that all acts or declarations offered into evidence during trial must have occurred or been made during the pendency of the conspiracy or to further the conspiracy, before such evidence is admissible against a co-conspirator. *Tofanelli v. U.S.,* 28 F. 2d 581 (9th Cir. 1928); *United States v. Goodman,* 129 F. 2d 1009 (2nd Cir. 1942); *United States v. Diez,* 515 F. 2d 892 (5th Cir. 1975); *United States v. Smith,* 520 F. 2d 1245 (8th Cir. 1975). A conspiracy cannot be furthered once it has ended. *Lutwak v. United States,* 344 U.S. 604 (1953); *United States v. Anderson,* 417 U.S. 211 (1974). It has further been held that such acts or declarations after a conspiracy has ended must be limited in admissibility only as against the person making them. *United States v. Logan,* 144 U.S. 263 (1892); *Krulewitch v. United States,* 333 U.S. 440 (1949); and *Lutwak v. United States, supra.*

Before an exception can apply to this rule, limiting conspiratorial statements to those made during the period of the ongoing conspiracy, there must be some evidence showing that

post conspiracy activities to conceal were part of the original plan or scheme of the conspirators. *Krulewitch v. United States, supra; United States v. Barelli,* 336 F. 2d 376 (2nd Cir. 1964); and *United States v. Register,* 496 F. 2d 1972 (5th Cir. 1964). The view that implies in every conspiracy there is an agreement to conceal the existence of the conspiracy has been repeatedly rejected and statements made at those points in time are not conspiratorial in nature and, therefore, inadmissible as against other co-defendants. *Lutwak v. United States, supra; Krulewitch v. United States, supra.*

The point in time when a conspiracy ends necessarily depends on the facts and circumstances of each case. *Krulewitch v. United States, supra,* recognized that the existence or absence of overt acts can establish a conspiracy has ended for purposes of determining the admissibility of statements of co-defendants. The admission of a co-defendant after termination of a conspiracy are inadmissible as violative of the Confrontation Clause of the Sixth Amendment to the United States Constitution. *Pointer v. Texas,* 380 U.S. 400 (1965); *Douglas v. Alabama,* 380 U.S. 415 (1965); *Barber v. Page,* 390 U.S. 719 (1968).

Instructions to the jury to consider a statement by the defendant who makes such an admission only against him and not as against a co-defendant have been held to be insufficient to protect a defendant's rights and only hopeful speculation that a jury will follow court's instruction to the letter. *Blumenthal v. United States,* 332 U.S. 539 (1947); *Burgett v. Texas,* 389 U.S. 109 (1967); *United States v. Haupt,* 136 F. 2d 661 (1943); *United States v. Gordon,* 253 F. 2d 177 (7th Cir. 1958); *Jones v. United States,* 342 F. 2d 863 (D.C. Cir. 1964); *United States v. Bozza,* 365 F. 2d 206 (2nd Cir. 1966).

If declarations of co-defendants fail to come within the conspiratorial exception to the hearsay rule, the case of *Bruton v. United States,* 391 U.S. 123 (1968), applies. In *Bruton v. United States,* the trial court admitted over objection to oral confession of a co-defendant against the petitioner, Bruton,

during their joint trial. The United States Supreme Court in an opinion by Mr. Justice Brennan held that the admission of this confession violated Bruton's right to cross-examine witnesses as guaranteed by the Confrontation Clause of the Sixth Amendment to the United States Constitution.

In the present case, the conversations elicited by the government witness, Ray Robbins, were undertaken and recorded more than two years after the theft in interstate commerce and division of the proceeds had been made. Although the indictment alleges that the conspiracy was ongoing up to the date thereof, that in and of itself did not meet the requirements that overt acts had yet to be fulfilled so as to keep the conspiracy going. The well recognized inherent efforts to conceal a crime as not being part of the conspiracy are not made otherwise unless and until they are proven to have been part of the original plan and scheme and overt acts to avoid detection were continued as part of the original conspiracy itself.

Therefore, when the trial court admitted statements of the co-defendants incriminating defendant Liosi, he had no available means to confront and cross-examine his accusers in violation of his Sixth Amendment right under the Constitution of the United States.

II.

A VIOLATION OF THE SIXTH AMENDMENT RIGHT TO TRIAL IN THE DISTRICT WHEREIN THE CRIME OCCURRED.

Prior to selection of the jury, counsel for defendant Liosi moved to dismiss the indictment on grounds that the United States District Court for the Western District of Pennsylvania, was not the proper venue for trial of his case (App. p. 1-2, 4-12). Said Motion was predicated upon the *Federal Rules of Criminal Procedure,* Rule 21 (B). The motion to dismiss or to alternately transfer this case to the United States District Court for the Northern District of Ohio was denied (App. p. 12).

During trial of the instant case the only evidence which was offered by the government as to venue within the State of Pennsylvania was that John Victor Esposito was taken by a co-defendant, Everett Bonds, to Pennsylvania, tied up, and told to report that his truck had been stolen in the State of Pennsylvania (App. p. 20-24). It is likewise clear that none of the conspiracy was formed within the State of Pennsylvania nor was any portion of Counts II or III, theft and receiving, undertaken within Pennsylvania. (App. p. 25-26, 27-28, 29). The witness, Esposito, and Special Agent Naum testified that although they "heard" the trailer in which the shrimp was transported was taken to Pennsylvania, it was never proven to actually have been located there during any period of the conspiracy. (App. p. 29-30, 31-32). The witness, Esposito, testified that to the best of his knowledge neither the truck nor the shrimp ever entered Pennsylvania (App. p. 25-26) and Special Agent Naum testified that the trailer was eventually located in Youngstown, Ohio (App. p. 162, 163-168).

Questions of venue in criminal trials are a matter of public policy and also a matter of a defendant's right to be tried in the county or jurisdiction where a criminal action must be brought and tried. *United States v. Johnson,* 323 U.S. 273 (1944); *Travis v. United States,* 364 U.S. 631 (1960); *United States v. Branan,* 457 F. 2d 1062 (6th Cir. 1972); *United States v. Walden,* 464 F. 2d 1015 (4th Cir. 1972). The venue of an offense allegedly committed against the United States is in the district in which the crime was committed. United States Constitution, Sixth Amendment; *Salinger v. Loisel,* 265 U.S. 224 (1924); *United States v. Anderson,* 328 U.S. 699 (1946); *United States v. Johnston,* 351 U.S. 215 (1956); *United States v. Sorce,* 308 F. 2d 299 (4th Cir. 1962); *United States v. El Rancho Adolphus Products,* 140 F.S. 645 (D.C. Pa. 1956); *United States v. Walden, supra.*

Title 18 United States Code, Section 659 specifically provides for venue for trial of an alleged violation of that section:

"The offense shall be deemed to have been committed not

only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said money, baggage, goods, or chattels."

Title 18 U.S.C., Section 3237 provides that any offense involving transportation in interstate commerce is a continuing offense and may be prosecuted in any district from, through, or into which such commerce moves. *United States v. Miller,* 246 F. 2d 486 (2nd Cir. 1957); *United States v. Floyd,* 228 F. 2d 913 (7th Cir. 1956); *United States v. Harbalt,* 426 F. 2d 1346 (5th Cir. 1970).

A prosecution for an alleged conspiracy to commit an offense against the United States may be tried in any federal district wherein an *overt* act in furtherance of the conspiracy was performed. *Gayson v. McCarthy,* 252 U.S. 171 (1920). The district wherein the conspiratorial agreement was made is a proper venue. *Hyde v. Shine,* 199 U.S. 62 (1905). The Federal Court District wherein the conspiracy was not formed, and no overt acts took place does not have jurisdiction to try the defendant. *United States v. Trenton Potteries,* 273 U.S. 392 (1927). An "overt act" of a conspiracy is defined as any act that furthers the conspiracy. *Yates v. United States,* 354 U.S. 298 (1957). Further, to be an overt act, the act must be an essential element of the crime since an agreement and "act to effect the object of the conspiracy" must *both* be present. *Hyde v. United States,* 225 U.S. 347 (1912).

Although an agreement is formed that a conspiracy continues to abandonment or success, the issue is determined by the last overt act of the conspiracy. *Bergschneider v. Denver,* 446 F. 2d 569 (9th Cir. 1971). Where the "unlawful object" of the conspiracy has been achieved and further acts or conspiracy is unnecessary, the conspiracy has ended. *McDonald v. United States,* 89 F. 2d 128 (8th Cir. 1937).

Grunewald v. United States, 353 U.S. 391 (1957) concluded that it is improper to imply a subsidiary conspiracy to

conceal criminal conduct from the mere fact that the conspiracy had been kept secret.

> "... Acts of covering up, even though done in the context of a mutually understood need for secrecy, cannot themselves constitute proof that concealment of the crime after its commission was part of the initial agreement amongst the conspirators." *Grunewald v. United States, Id.*, at p. 402.

A reviewing court must, therefore, ask whether there is

> "direct evidence [of] an express original agreement among the conspirators to continue to act in concert in order to cover up, for their own self-protection, traces of the crime after its commission." *Grunewald v. United States, Id.*, at p. 404.

See also, *United States v. Hickey,* 360 F. 2d 127 (7th Cir. 1966); *United States v. Nowak,* 448 F. 2d 134 (7th Cir. 1971); and *United States v. Portner,* 462 F. 2d 678 (2nd Cir. 1972).

Count I of the indictment charges a violation of Title 18 U.S.C. 371, Conspiracy. Counts II and III allege violations of the "substantive" crime of theft from interstate commerce and receiving goods stolen in interstate commerce in violation of Title 18 U.S.C. 659, Interstate or Foreign Shipments by Carrier (App. p. 197-201). As noted earlier, Section 659 provides for venue in the district where the theft or receipt occurred. As to the conspiracy to steal or receive, venue lies where the conspiracy was formed or any overt act in furtherance of the conspiracy took place. *United States v. Craig,* 573 F. 2d 513 (7th Cir. 1978).

The present indictment alleges that the false report of John Esposito to the Pennsylvania State Police was an overt act in furtherance of the objectives of the conspiracy. (App. p. 198). When John Esposito was driven to the State of Pennsylvania the actual taking of the shrimp from interstate shipment had been completed. Indeed, arguably the theft was consummated at the time Everett Bonds diverted from his scheduled route to

Massachusetts and drove to Ohio. Since only defendant Bonds was shown to have taken John Esposito to Pennsylvania and ordered him to make false reports to the Pennsylvania State Police, his acts, by themselves, do not become part of the conspiracy to be imputed to the other defendants. No further acts were required to steal or receive from interstate commerce. The deed, as alleged in the substantive counts of the indictment, was done and the conspiracy to commit these acts was thereby ended when the shrimp was initially stolen and warehoused in Cleveland, Ohio. At that time the last overt act to make the alleged conspiracy succeed had been accomplished.

Notably absent is any evidence that there was an agreement among the conspirators to continue their actions in concert to conceal their criminal activities. Hence, followin that actual theft of the shrimp from interstate commerce, the diversion of law enforcement authorities to another state to avoid detection does not, in and of itself, establish venue in that state. Here, Pennsylvania was allegedly used as a ruse to lead the investigation outside of the State of Ohio. At the time this attempt to cover up took place, the shrimp had already been taken, transported to Ohio, and concealed in a warehouse in the City of Cleveland. At that point in time the crime was completed and the conspiracy terminated. Any activity which took place following the termination of the conspiracy as charged would be other than necessary to consummate these alleged activities and therefore not overt acts.

The defendants have therefore been denied their right to trial in the district wherein the crime occurred as guaranteed to them by the Sixth Amendment to the United States Constitution.

III.

THE IMPORTANT QUESTION OF WHETHER A JURY SHOULD BE ALLOWED TO CONSIDER EVIDENCE OF BOTH THEFT AND RECEIVING STOLEN PROPERTY AND TO RETURN CONVICTIONS FOR BOTH THEFT AND RECEIVING STOLEN PROPERTY AS TO ONE DISTINCT SHIPMENT IN INTERSTATE COMMERCE.

Following the arguments of counsel the court considered the instructions requested by attorneys for the defense. The trial court overruled the joint request of counsel that the court instruct the jury they could convict on the charge of theft in interstate commerce as alleged in Count II or receiving as alleged in Count III, but the jury could not convict any defendant on both theft and receiving (App. p. 172). The renewed request was denied on the record during the instructions to the jury (App. p. 183-187), and the court specifically instructed the jury it could convict any defendant of both theft and receiving (App. p. 183-185).

The offense of receiving stolen property requires a wrongful taking of the subject property by someone other than the accused and receipt or concealment by the accused with knowledge that the property has been stolen. A person who steals property cannot be convicted of receiving, buying, concealing or aiding in concealing property stolen. *United States v. Milanovich,* 365 U.S. 151 (1961); *Glass v. United States,* 351 F. 2d 678 (10th Cir. 1965).

A person who is a principal to theft cannot be convicted of receiving, buying, concealing or aiding in concealing property stolen and error is had when a trial court permits the jury to convict the accused of both theft and receiving stolen property. *Milanovich v. United States, supra; Baker v. United States,* 357 F. 2d 11 (5th Cir. 1966).

Hence, when an accused steals goods under circumstances

such that receiving is a part of the theft itself, he cannot be convicted of receiving the stolen goods. *Milanovich v. United States, supra.*

> "It is hornbook law that a thief cannot be charged with committing two offenses — that is stealing and receiving the goods he had stolen." *Milanovich v. United States, supra,* at p. 558 (dissenting opinion of Justice Frankfurter).

Further, an accessory to theft before or after the crime is committed, but not present when the property was actually taken, but received the goods after the theft may be convicted only of receiving stolen property. *Aaronson v. United States,* 175 F. 2d 41 (4th Cir. 1949); *United States v. Pauldino,* 487 F. 2d 127 (10th Cir. 1973).

Milanovich v. United States, supra, clearly controls the applicable law here. In *Milanovich* the trial court likewise had before it evidence of the defendants, a husband and wife, aiding and abetting a theft. However, only one defendant, the wife, received the goods several weeks after the theft with an intervening concealment of stolen property by the actual thieves. The United States Supreme Court, as per Mr. Justice Stewart, affirmed the reversal by the Fourth Circuit Court of Appeals of the conviction of the defendant-wife on both theft and receiving charges. The case was then remanded for retrial.

> "We hold based on what has been said as to the scope of the applicable statute, that the jury could convict of either larceny or receiving, but not of both . . .
>
> . . . yet there is no way of knowing whether a properly instructed jury would have found the wife guilty of larceny or of receiving (or, conceivably, neither)," at page 555.

Milanovich cited *Heflin v. United States,* 358 U.S. 415 (1959) which held that the trial court erred in not instructing the jury that the petitioner could not be separately convicted of stealing and receiving the proceeds of the same theft.

Reference is made in *Milanovich v. United States,* to the statutory provisions violated therein. The rule prohibiting multiple convictions turns upon whether Congress intends to "Pyramid penalties for lesser offenses following the robbery." *Heflin v. United States, supra,* at page 419. Without clear statutory intent to create a separately punishable and distinct crime, the common law rules as to theft and receiving must prevail; a person cannot be convicted of both theft and receiving unless Congress has specifically provided for punishment of both acts and also clearly overruled the common law prohibition against conviction for both. See also *Prince v. United States,* 352 U.S. 322 (1957).

Instructive as to what remedy is available is *United States v. Solimine,* 536 F. 2d 703 (6th Cir. 1976). In *Solimine,* the appellant was charged with violating 18 U.S.C. 659; similarly, theft and receiving and possession convictions were all obtained. The court there clearly implied that the strength of the evidence as to theft allowed the remedy of reversal on the convictions for receiving and possession but affirmed the conviction for theft from interstate commerce.

> "In some instances, where proof of theft may be dubious relative to the proof of possession, both theft and possession of the same goods may be charged. In such cases, the jury might reasonably find the defendant not guilty of theft, but guilty of possession. The dismissal of the possession count could, therefore, be inappropriate. *Improper cumulation of convictions can be avoided however, by instructing the jury that it may convict of either theft or possession, but not of both.*" (Emphasis added). *United States v. Solimine, Id.,* at page 711, footnote 30.

In the present case it is clear the trial court failed to caution the jury to convict, if it so found, of theft or receiving but not both charges. Implicit in such a situation is that the properly instructed jury might have acquitted the defendant if not forced with a multiplicity of alleged violations of the law.

Further of significance is the fact that the defendant, Fredrick Liosi, does not appear involved in any activity related to the stolen shrimp, until October 24, 1975, approximately six days after the shrimp was stolen and stored in a warehouse in Cleveland, Ohio (App. p. 37-38, 43-44). The evidence that defendant Liosi had any knowledge that the shrimp was stolen is further questionable for even the witness, Robbins, was under the impression that it was the result of a bankruptcy; evidence to the contrary, as to defendant Liosi, is unavailable. (App. p. 69-71, 33-36).

In view of the failure of the court to properly instruct the jury, the jury was faced with a floodtide of alleged criminal activities which could very well have influenced its verdict. It is therefore incumbent upon the court to reverse the conviction of defendant Liosi as to Count II alleging theft in interstate commerce and Count III alleging receiving goods stolen in interstate commerce.

CONCLUSION

Based upon the foregoing reasons, petitioner respectfully urges this court to grant the Writ of Certiorari and accept this case for review.

Respectfully submitted,

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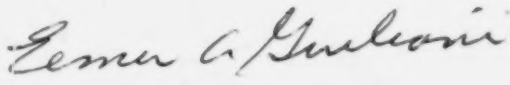
PROOF OF SERVICE

The undersigned certifies that four true and correct copies of the within Petition for Writ of Certirari have been served upon the office of the United States Solicitor General, Wade H. McCree, Department of Justice, Pennsylvania Avenue, North West, Room 5614, Washington, D.C. 20530, postage prepaid, on this 5th day of October, 1979.



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